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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 165

SELINA ROMMEL, ET AL., *Petitioners*

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S OPPOSITION

JOHN W. PEHLE
JAMES H. MANN
1210 18th Street, N. W.
Washington 6, D. C.

RICHARD BANCROFT
60 State Street
Boston 9, Massachusetts

Counsel for Petitioners

Of Counsel:

PEHLE, MANN, RIEMER & LUNFORD
1210 18th Street, N. W.
Washington 6, D. C.

PUTNAM, BELL, SANTRY & RAY
60 State Street
Boston 9, Massachusetts

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POINT I

If this Court does not grant *certiorari* in the cases at bar, a conflict of decisions will remain between the Court of Appeals for the Third Circuit, *Willenbrock* v. *Rogers*, 255 F. 2d 236 (3 Cir. 1958), and the Court of Appeals for the District of Columbia Circuit, *Kennedy* v. *Rommel*, 301 F. 2d 544 (1962).

In commenting on the *Willenbrock* case Respondent observes, "The case was subsequently settled out of court." (p. 11). This was done only after denial of rehearing. The fact of settlement is not significant except as it indicates the Government accepted the decision without further action. Petitioners submit

that this decision is not correctly characterized as a "somewhat interlocutory ruling" (p. 11). It is a decision of the Third Circuit Court of Appeals which is dispositive of the issue in the case, and unlike the decision in the case at bar, is without what amounts to a dissent.

POINT II

The constitutional argument made in Point III of the Petition (pp. 23-26), is not "frivolous", as characterized by Respondent (p. 12). The argument is based on decisions of this Court. What Petitioners contend is that the constitutional protection against the seizure of property without the payment of just compensation cannot be avoided by merely characterizing the owner of the seized property as enemy when he was not one at common law and when it cannot be shown that Congress intended to change the common law rule.

POINT III

Respondent asserts that "the question presented is of little current importance at this late stage in the administration of the alien property program," and states that as of April 1962 only 621 claims were still pending (p. 7). Petitioners urge that the confiscation of their property is a matter of sufficient seriousness to warrant the consideration and decision of this Court, and the relief from confiscation which they seek. They also urge that the *Trading With the Enemy Act*, permanent legislation, and the limitations on the War Power in the area of confiscation are not matters of mere historical interest, but have a continuing importance.

POINT IV

Respondent refers to the denial of *certiorari* in *N. V. Handelsbureau La Mola* v. *Kennedy*, Mr. Justice Black

dissenting, 82 S. Ct. 1582 (1962). In that case a Petition for Rehearing has been filed and is now pending. It may well be that on reconsideration the petition will be granted. Whether or not the petition in that case is granted, the petition in the cases at bar should be granted, for the reasons set out in the petition.

POINT V

In a footnote (p. 10) Respondent suggests an alternative ground of affirmance, that the Petitioner de Courten was an enemy agent. The Trial Court below found that the Petitioner de Courten was not an enemy agent, and furthermore she is only one of the four petitioners (J.A. 55, 61). Accordingly, the suggested alternative ground does not exist.

POINT VI

Respondent suggests on the constitutional issue that if there is a remedy Petitioners should be relegated to the Court of Claims and not permitted to maintain their actions under Section 9(a) of the Act. This argument is directly contrary to *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952) and *Clark* v. *Uebersee Finanz Korp.*, 332 U.S. 480 (1947). In both cases the constitutional issue was given weight in construing the Act to give a remedy. The *Guessefeldt* decision, on which Petitioners expressly rely, the Respondent chooses to ignore, from which course of action Petitioners are obliged to conclude that Respondent finds the decision unanswerable.

CONCLUSION

This Court should review the decision of the Court below, which permits the confiscation of the property of Petitioners. It is the constitutional rule that property of non-enemies may not be taken for public use without

compensation, even though the public use is in the exercise of the War Power. It is well established under the common law rule, which the Act did not change, that Petitioners were friendly aliens, and by this Court that such persons are entitled to the protection of the Fifth Amendment to the Constitution.

This Court should resolve the conflict between *Willenbrock* and the cases at bar by adopting the rule of the *Willenbrock* case that prior residence in enemy territory does not serve to make an enemy, for the purposes of Section 9(a) of the Act, of a person with respect to his property seized after his residence in enemy territory has ceased. That rule accords with the common law and is supported by the legislative history of the Act. The cases at bar should be reversed because their holding is contrary to the common law and the Congressional intent.

Respectfully submitted,

JOHN W. PEHLE
JAMES H. MANN
1210 18th Street, N. W.
Washington 6, D. C.

RICHARD BANCROFT
60 State Street
Boston 9, Massachusetts

Counsel for Petitioners.

Of Counsel:

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1210 18th Street, N. W.
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PUTNAM, BELL, SANTRY & RAY
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Boston 9, Massachusetts